MONTANA
Management View
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House Bill 13 holds pay at FY '03 level, adds $8.1 million to insurance benefits

The state and major employee unions were about $34 million apart in general fund spending proposals when negotiations over the Fiscal Year 2004-05 pay plan ceased in November. The state's last bargaining proposal is captured in House Bill 13. House Bill 13 would maintain Fiscal Year 2003 pay rates for employees through 2004-05 biennium. Containing no general pay raises, House Bill 13 would increase the state's contribution to each employee's health insurance by $94 per month (or by 54 cents per hour, or by $1,128 per year) over the next two years. This compensation increase would cost the state general fund $8.1 million over the biennium.

State representatives bargained with representatives of the MEA-MFT, Montana Public Employees Association, and American Federation of State, County, and Municipal Employees. They held several bargaining sessions between December 2001 and November 2002. The unions' last proposal sought an increase in personal services funding of 4-percent per year for pay raises, on top of the $8.1 million offered by the state for health insurance. The difference between the state's last proposal and unions' last proposal was about $34 million over the two-year period.

Highlights

The state currently pays $366 per month, or $4,320 per year, toward each employee's health insurance. House Bill 13 would increase the benefit to $410 per month beginning January 2004, and to $460 per month (or $5,520 per year) beginning January 2005. For an employee who earns $20,000 per year in wages and $4,392 per year toward

health insurance, House Bill 13 represents a compensation increase of 4.6 percent over two years. For an employee who earns $30,000 in wages plus the health insurance benefit, House Bill 13 represents a compensation increase of 3.3 percent over two years.

LMTI Update

The Labor-Management Training Initiative (LMTI) is a project between the State of Montana, the Montana Public Employees Association, and MEA-MFT to support effective labor relations through specialized training and skill development.

Upcoming training designed for front-line labor and management reps

Supervisors and job stewards in unionized state offices must work within the parameters of the negotiated labor agreement. The LMTI's Contract Administration & Grievance Handling workshop, offered in several Montana locations over the next six months, will help advocates interpret and administer the contract and resolve workplace disputes at their earliest steps. Participants will also gain a practical understanding of the processes and perspectives used by arbitrators when resolving contractual disputes.

Registration - Interested supervisors, job stewards, and others involved in contract administration may register through their agency human resource office. Registration for most workshops is limited to 60 participants per session.

Dates and Locations –

February 4-5	Fairmont	Fairmont Hot Springs Resort
March 4-5	Miles City	Guest House (REGISTRATION FULL)
March 18-19	Helena	Holiday Inn Downtown
Aprill 9-10	Kalispell	Outlaw Inn
April 29-30	Billings	The Sheraton
May 6-7	Miles City	Holiday Inn Express
May 13-14	Missoula	Doubletree Edgewater
June 10-11	Great Falls	University of Great Falls

Costs – The cost of registration, training, material, lunches and snacks will be paid through the Labor-Management Training Initiative.

Labor-management committees: Need help with your charters?

The LMTI sponsored several workshops during the past year to help labor-management committees become more effective through the use of interest-based problem solving.

To follow up on that training, we're offering individualized assistance to committees that want to take the next step – developing charters. The Labor Relations Bureau can arrange for FMCS trainers to help committees:

- Craft mission statements,
- Determine appropriate membership,
- Define authority and responsibility,
- Develop procedures and ground rules, and
- Communicate with constituents.

To find out more about this one-day, on-site service, contact the Labor Relations Bureau at 444-3871.

Labor relations conference planned for state law enforcement and protective service workers

Efforts are under way to bring together a blend of bargaining unit members and managers in law enforcement and protective service occupations for a labor relations conference May 19-20 in Helena.

Gordon J. Graham, a 29-year veteran of California law enforcement and nationally known presenter, will give a presentation on organizational risk management – "*Why things go right – Why things go wrong*."

FMCS Commissioner Andrew Hall will give a presentation on effective labor relations in a law enforcement or protective services work environment. Many state managers and bargaining representatives know Andy through his training on labor-management committees and interest-based problem solving training. Before joining the Federal Mediation and Conciliation Service in 2000, Andy practiced law, served as a police officer in Seattle, and consulted for law enforcement labor organizations in Washington, Oregon, and Alaska.

Also, a panel of labor and management representatives will examine due process issues (including *Weingarten* and *Garrity* rights) in a law enforcement or protective services work environment.

For more information about this conference, contact Kevin McRae in the Labor Relations Bureau (444-3789).

When is enough enough?!
Frustration meets caution in discharge cases

"What do you *mean* we can't discharge him?! When is enough *enough*?!" Ever heard or said that one? It's a classic frustration. In this *Management View* article, we respond to the following question submitted by a reader: Why do personnel officers take such a cautious approach to employee discharge?

Maybe an employee with an impressive disciplinary record won't clean up her act. Maybe another employee with a satisfactory work record commits a first-time infraction severe and egregious enough to cause major liability for his agency. Understandably, the supervisor can't tolerate recurring misconduct or dangerous liability. So why is it so difficult to get rid of the problem? The answer is, we don't get to define "the problem." In the end, a neutral labor arbitrator, who is totally unfamiliar with your business operation, will determine "the problem" and impose a binding "solution." Personnel officers take a cautious approach to help ensure the arbitrator isn't pointing at management when the problem is identified and the solution imposed. *(See the Arbitration Roundup on page 7 to see why one Montana arbitrator upheld a state government discharge in one instance, and overturned one in another instance.)*

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The cost of losing discharge arbitration is immense. Imagine having to welcome back the problem employee. He's reinstated. He feels vindicated by the arbitrator's award. He feels virtually "untouchable" in regard to future corrective action. He's exhilarated by the fat back-pay check that came out of your budget, but not so exhilarated to refrain from crying "retaliation" to the union representative every time you issue a new work directive. You get the picture. It's not pretty. It takes some caution and careful consideration to ensure this never happens to you. It all makes more sense if we consider: (1) How arbitrators view discharge as economic "capital punishment"; (2) How arbitrators are unwilling to uphold discharge in certain cases; (3) What arbitrators look for when reviewing disciplinary penalties.

Arbitrators view discharge as "capital punishment"

Discharge is recognized as the extreme industrial penalty since the employee's job, benefits and reputation are at stake. Various arbitrators have referred to the penalty of discharge as "industrial capital punishment," the "capital punishment of the industrial

society," and the "capital industrial penalty" *(How Arbitration Works; Elkouri & Elkouri; Fifth Edition)*.

Arbitrators place a heavy burden of proof on management in two areas. The first involves proof of wrongdoing. The second, assuming that guilt of wrongdoing is established, concerns the question of whether the punishment assessed by management should be upheld or modified.

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The fact arbitrators can find employees guilty as charged, but reinstate them with a penalty less than discharge, can make arbitration a tricky roll of the dice. Additionally, the "quantum of proof" varies depending on the nature of the alleged misconduct. In some cases arbitrators have required "proof beyond a reasonable doubt." In other cases arbitrators require a lesser degree of proof, such as "clear and convincing evidence" or a "preponderance of the evidence." These are important pre-disciplinary considerations when deciding whether to discharge, suspend, or impose an alternative penalty.

Arbitrators can modify disciplinary penalties

Arbitrators are unwilling to uphold an employer's disciplinary action where management has failed to meet certain requirements. Here are some examples from a book titled the *Grievance Guide*, published by the Bureau of National Affairs. Following the examples are similar cases that occurred in Montana state government.

In a private-sector case, where a mining company discharged a locomotive brakeman who accidentally shot himself attempting to shoot a crow alongside the employer's railroad track, the arbitrator reinstated the employee to work "since the worker's action was not related to railroading."

Similarly, in a Montana state government case, an arbitrator reinstated an employee who carried a loaded handgun in a state car without the employer's knowledge of the gun or authorization to carry it. In fact, the employee had requested authority to carry a gun and the employer denied the request. Later, the employer discovered a bullet hole in the car. When caught, the employee said his brother had been playing with the gun near the state car and accidentally shot a hole through the car. The state proved the grievant knew he could be terminated for carrying a handgun and for failing to report the damage to the car. The arbitrator agreed with the employer on virtually everything but the severity of penalty. He found the penalty of discharge to be too severe. The arbitrator ordered a limited unpaid suspension and reinstated the employee with back pay.

In a California public-sector case, an arbitrator overturned a 30-day disciplinary suspension of a police officer who hit a handcuffed prisoner in a holding cell. The

prisoner was trying to spit in the officer's face for a second time. The arbitrator found the officer used only enough force to counteract the assault.

Similarly, in a Montana state government case, an arbitrator reinstated a discharged employee who kicked and hit a handcuffed inmate after the inmate spit in the employee's face. The employee said the spit blinded him and he believed the handcuffed inmate was going to kick him in the face. The arbitrator believed the employee exercised reasonable restraint within the range allowed by the employer's use-of-force policy.

What factors do arbitrators consider in reviewing penalties?

Here are some factors arbitrators consider when reducing penalties (from *How Arbitration Works; Elkouri and Elkouri*). These considerations assume the employer has proven the employee committed the infraction and the employee received due process prior to the penalty being imposed. Now the penalty is under review.

Lax enforcement of rules. Arbitrators don't hesitate to reduce penalties, assessed without clear and timely warning, where the employer over a period of time has condoned the problematic behavior. Lax enforcement of rules may lead employees reasonably to believe management sanctions the conduct in question. Even where the employee has engaged in conduct that is obviously improper, such as threatening a supervisor, the fact that management had failed to impose discipline in the past can be a signal that unacceptable behavior will be tolerated.

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Unequal or discriminatory treatment. Enforcement of rules and assessment of discipline must be exercised in a consistent manner. All employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees).

Knowledge of rules and warnings. Employer rules or directives must be reasonable and consistently applied and enforced. In a prominent case, Arbitrator William Hepburn stated, *"Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless conduct is so clearly wrong that specific reference is not necessary."* In determining whether more severe discipline is appropriate, arbitrators make a comparison between the offenses to determine whether the warning received as a result of a prior offense adequately notified the employee that he or she should not have engaged in the conduct for which the more severe discipline was imposed.

Length of service with the employer. Long service with the employer, particularly if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration. However, it only goes so far. In one case, an arbitrator noted the grievant's 22 years of service but upheld a discharge for absenteeism: *"Even long seniority counts only for so much. It buys extra consideration, it merits the benefits of any reasonable doubts, and it obligates an employer to view the employee's record as a whole rather than treating events in isolation. Nevertheless, even senior employees have to come to work regularly."*

Grievant's past record. Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record, and it may be aggravated by a poor one. The employee's past record often is a major factor in the proper penalty for an offense.

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

Progressive discipline: One arbitrator -- two decisions.

Arbitrators generally expect management to use a system of progressive discipline under which the employee is warned or given disciplinary suspensions before being hit with the ultimate penalty of discharge *(Grievance Guide; Bureau of National Affairs)*.

Management is not bound by a progressive-discipline formula in cases of serious offenses, such as stealing, assault, and drunkenness on the job. For most offenses, however, progressive discipline is the standard. Below are two disciplinary cases from Montana state government in which Arbitrator William Corbett sustained a grievance and denied a grievance. Both cases involved the subject of progressive discipline. The facts in each case were different, which explains the different outcomes.

The case of tardiness and absenteeism

A state agency hired an employee into a receptionist position. She was the only receptionist for a particular division within the department. She was the first contact for anyone who visited or called the division. Her work hours were 8 a.m. to 5 p.m., so punctuality was essential.

The employee missed 11 work days in her first four months for a variety of personal and medical reasons. In her fifth month of work she was hospitalized, causing her to miss

an additional two weeks of work. When she returned the employer notified her she would need to attend work regularly and on time. She assured the employer she could do so. But she could not.

After she achieved permanent status, she missed more workdays and resumed her tardy behavior when she was at work. In her eighth month of employment the employer issued a written warning that further tardiness and absenteeism would be grounds for "further disciplinary action that may lead to termination." Shortly after receiving the notice, the employee missed three more days of work. The employer took no disciplinary action. In her 10th month of employment she missed two more days of work, after which the employer discharged her.

Arbitrator Corbett reinstated the employee. He also awarded back pay at the agency's expense. The arbitrator found the employer, in selecting the words it used for the written warning *("further misconduct will be grounds for further disciplinary action that may lead to termination")*, promised a procedure of progressive discipline that never occurred. The employer's next corrective action after issuing the warning was to discharge the employee, which the arbitrator found to be contrary to the employee's reasonable expectations and the employer's own written words.

The case of misconduct smorgasbord

A meal isn't the only thing that might come in a variety of dishes and styles. So can misconduct. In a different case, a Montana state agency suspended an employee without pay for four days following an incident in which she damaged a piece of equipment.

The nature of the work and the necessity for careful use of equipment called for contract language that said: *"Any preventable accident which occurs more than 18 months in the past shall not be considered in the determination of disciplinary action for future preventable accidents."*

The grievant, in the 18 months that preceded the suspension for the damaged equipment, had been warned and counseled about a number of unrelated behavior problems. These included warnings for two separate instances of carrying an unauthorized passenger in a state vehicle, warnings for two separate instances of taking a day off without her supervisor's approval, and a warning for performing a certain work duty negligently.

The union argued the various infractions were not similar enough to constitute a severe problem in any one area. The union argued a four-day suspension was too severe, and that progressive discipline requires something less than a suspension given this was the first incident of broken equipment.

Arbitrator Corbett upheld the suspension. The union argued an employer may not consider prior disciplinary situations that are factually unrelated to the current disciplinary problem. Corbett dismissed the argument. *"Progressive or corrective discipline is premised on the belief that employees should be given an opportunity to*

come into compliance with the legitimate expectations of their employer," Corbett ruled. *"The principle is that it is the responsibility of the employee, after appropriate notice, to meet those expectations. An employer is not compelled to accept the unacceptable from an employee merely because the employee finds new ways to be unacceptable."*

Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/css

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